15-2 US 178

RECORD, CASE NO. 14501.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM NO., 396.

THE UNITED STATES, APPELLANT,

vs.

DANIEL SHEA.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 27, 1891.

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1 UNITED STATES COURT OF CLAIMS.

DANIEL SHEA
vs.
THE UNITED STATES. } No. 16145.

Filed April 10th, 1888.—J. R.

I. PETITION.

To the Honorable Chief Justice and Judges of the United States Court of Claims:

Your petitioner, Daniel Shea, respectfully represents that he is a citizen of the United States and a resident of the city, county, and State of New York.

That on the twenty-eighth day of May, eighteen hundred and eighty-six, he made and entered into a contract with Lieutenant-Colonel Henry C. Hodges, Deputy Quartermaster-General United States Army, for and in behalf of the United States, by which he, the said Shea, agreed to provide and furnish to the United States "whenever called upon during the fiscal year ending June thirtieth, eighteen hundred and eighty-seven, such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service for the U. S. Army between New York city and Governor's Island, New York, Governor's Island, Sandy Hook, and New York Harbor generally, respectively, the steamers 'Atlantic,' 'Ordnance,' and 'Chester A. Arthur.'

"That the vessels furnished as aforesaid must each have an engineer and a fireman and conform to the following conditions, viz: The steamer to take the place of the 'Chester A. Arthur' must be of the size
2 and the character of the 'Chester A. Arthur,' and the steamers to take the places of the 'Atlantic' and 'Ordnance,' respectively, must have the capacity for freight and passengers and be of the size and character of the steamer 'James Bowen,' and that all the vessels furnished must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirements of the law.

"And that for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part (Shea) shall be paid at the office of the disbursing quartermaster U. S. Army, at New York, as follows: The sum of sixty-seven dollars per day for each vessel employed by the day, and the sum of ten dollars per hour for each vessel employed, including the engineer and the fireman when employed by the hour, and for the said remainder of the crew, when required, the sum of thirteen dollars per day." See Exhibit "A."

That under said contract the steamer "James Bowen" entered the United States service, and while in said service and under the charge and exclusive management of the Quartermaster's Department, on the 1st day of January, 1887, collided with the Brooklyn ferryboat "Atlantic" while on her passage from the Battery to Governor's Island, New York Harbor, and was so damaged that it became necessary to repair the same,

which was done under the supervision of Colonel Hodges, and in mean time the said Shea was obliged to furnish another boat for the use of the Government. The time necessarily consumed in the repairs of the "James Bowen" was sixty days, and at the expiration of the time she again put in the same active service as at the time of the collision. That for this time consumed in repairing a regular voucher was issued and delivered to the said Shea, as follows:

3 FORM NO. 13 (VOUCHER TO ABSTRACT B).

The United States to Daniel Shea, Dr.

Place and date.		Dols.	Cts.
N. Y. City, April 1, 1887.	For hire of the steamer "James Bowen," from Jan'y 1st to March 2d, 1887, inclusive, 61 days, at $55 per day	$3,355.	00
	Engineer and fireman, 61 days, at $7.00 per day	427.	00
		3,782.	00

The vessel was hired under contract of Daniel Shea, dated May 28, 1886. She was damaged in collision on January 1, 1887, while in the service and under the charge and exclusive management of the Quartermaster's Department. The period covered by this voucher is for the time the "James Bowen" was necessarily laid up for repairs of said damage. The contract rate for the boat is $67 per day, including an engineer and fireman, but, in view of the "Bowen's" being laid up, the rate is reduced to $55 per day for the boat and $7.00 for the engineer and fireman during the period. The engineer and fireman were on the boat supervising the work and watching the boat, as is customary in such cases.

Appropriation for fiscal year ending June 30, 1887.

I certify that the above account is correct and just; that the services were rendered as stated; that they were necessary for the public service, and are borne on my report of persons, &c., for the month of .

(Signed) HENRY C. HODGES,
Deputy Q. M. General, U. S. A.

Signed in duplicate.
See Exhibit "B."

That the said account was forwarded by said Henry C. Hodges, Deputy Quartermaster as aforesaid, for the consideration of the Quartermaster-General, at Washington, March 29th, 1887, with the recommendation—

"That authority be granted to pay for said service, and with the following statement annexed thereto:

4 "The facts are as stated herein. The 'James Bowen' was under charter to the Quartermaster's Department, and, as the Quartermaster-General is aware, was, on the 1st of January, 1887, on one of her trips between the Battery and Governor's Island, run into by the Brooklyn ferryboat 'Atlantic.'

"The 'James Bowen' was at the time under the exclusive control and management of the Government, being manned and navigated by employés of the Quartermaster's Department.

"In the collision the 'James Bowen' was very badly damaged, and while undergoing repairs her owner was compelled to hire a vessel in her stead. The within claim is made for reimbursement of that expense. I regard it as perfectly proper, reasonable, and just, and therefore recommend its payment."

(Signed) HENRY C. HODGES,
Deputy Q. M. Gen., U. S. Army, Depot Quartermaster.

See also Exhibit "C."

That the United States is justly indebted to the petitioner in the sum of $4,087, the amount due for the said sixty-one days consumed in repairs, according to the terms of said contracts, and that no payment has ever been made therefor.

That no assignment or transfer of said claim, or of any interest therein, has been made, and that the petitioner is justly entitled to the amount herein claimed.

Wherefore your petitioner prays that the sum of $4,087 may be found due your petitioner, and that judgment be entered in his favor for that amount.

DANIEL SHEA,
By HORACE S. CUMMINGS,
His Attorney in Fact.
FRANKLIN H. MACKEY,
CUMMINGS & BAKER,
Of Counsel.

DISTRICT OF COLUMBIA:

Before me personally appeared Horace S. Cummings, attorney in fact for the said Daniel Shea, the above-named petitioner, and made oath that the matters averred on his personal knowledge in the foregoing petition are true and those stated on information and belief he believes to be true.

HORACE S. CUMMINGS.

Subscribed and sworn to this 5th day of April, 1888.

[L. S.] WM. K. ELLIS,
Notary Public.

EXHIBIT A.

Articles of agreement entered into this twenty-eighth day of May, eighteen hundred and eighty-six, between Lieut. Colonel Henry C. Hodges, Deputy Quartermaster-General, United States Army, of the first part, and Daniel Shea, of the county of New York, State of New York, of the second part.

This agreement witnesseth that the said Lieut. Col. Henry C. Hodges, Deputy Quartermaster U. S. Army, for and in behalf of the United States of America, and the said Daniel Shea, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

ARTICLE 1. That the said Daniel Shea shall provide and furnish to the party of the first part, whenever called upon during the fiscal year ending

June thirtieth, eighteen hundred and eighty-seven, such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service for the U. S. Army between New York City and Governor's Island, New York, Governor's Island and Sandy Hook, and New York Harbor generally, respectively, the steamer "Atlantic," "Ordnance," and "Chester A. Arthur;" that the vessels furnished as aforesaid must each have an engineer and
6 fireman and conform to the following conditions, viz: The steamer to take the place of the "Chester A. Arthur" must be of about the size and the character of the "Chester A. Arthur," and the steamers to take the places of the "Atlantic" and "Ordnance," respectively, must have the capacity for freight and passengers and be of the size and character of the steamer "James Bowen;" and that all the vessels furnished must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirements of the law.

It is further agreed that the fuel required by said vessels so furnished while in service, under this agreement, shall be supplied by the Government, and that this contract shall commence on the first day of July, eighteen hundred and eighty-six.

And it is further agreed that the party of the second part shall furnish, when required, the remainder of the crew, consisting of a captain, a mate, two deckhands, and a fireman.

ARTICLE 3. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fullfillment is granted by Congress and is available.

ARTICLE 4. That for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part shall be paid, at the office of the disbursing quartermaster U. S. Army, at New York City, as follows: The sum of sixty-seven (67) dollars per day for each vessel employed, including the engineer and the fireman, when employed by the day, and the sum of ten (10) dollars per hour for each vessel employed, including the engineer and the firemen, when employed by the hour; and for the said remainder of the crew, when required, the sum of thirteen dollars per day.

ARTICLE 5. That in case of failure of the said party of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the
7 power to hire vessels elsewhere in open market at the sole expense and charge of the party of the second part.

ARTICLE 6. Neither this contract nor any interest therein shall be transferred by the said Daniel Shea to any other party or parties, and any such transfer shall cause the annulment of the contract so far as the United States is concerned; all rights of action, however, for any breach of this contract by the said Daniel Shea are reserved to the United States.

ARTICLE 7. No member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

ARTICLE 8. This contract shall be subject to approval of the Quartermaster-General U. S. Army.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

Article 2 stricken out before execution.

(Sgd.) HENRY G. HODGES, [L. S.]
Deputy Quartermaster-General U. S. A.

(Sgd.) DANIEL SHEA. [L. S.]

Witnesses:

(Sgd.) HUGH SIEBERG.

(Sgd.) GEORGE F. OTIS.

EXHIBIT B.

UNITED STATES OF AMERICA,
Treasury Department, April 7th, 1888.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of a paper on file in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first-above written.

[L. S.]

C. S. FAIRCHILD,
Secretary of the Treasury.

8 *The United States to Daniel Shea, Dr.*

Place and date.		Dolls.	Cts.
N. Y. City, Apr. 1, '87.	For hire of the steamer "James Bowen," from January 1, to March 2d, 1887, inclusive, 61 days at $55 per day	$3,355.	00
	Engineer and fireman, 61 days, @ $7 per day	427.	00
		3,782.	00

The vessel was hired under contract of Daniel Shea, dated May 28th 1886. She was damaged in a collision on January 1, 1887, while in service and under the charge and exclusive management of the Quartermaster's Department. The period covered by this voucher is for the time the "James Bowen" was necessarily laid up for repair of said damage. The contract rate for the boat is $67.00 per day, including an engineer and a fireman, but, in view of the "Bowen's" being laid up, the rate is reduced to $55.00 per day for the boat and $7.00 per day for the engineer and fireman during this period.

The engineer and fireman were in the boat supervising the work and watching the boat, as is customary in such cases.

I certify that the above account is correct and just; that the services were rendered as stated; that they were necessary for the public service, and are borne on my report of persons, &c., for the month of , 18 .

HENRY C. HODGES,
Deputy Q. M. General, U. S. A.

9 EXHIBIT C.

NEW YORK DEPOT OF THE QUARTERMASTER'S DEPARTMENT,
HOUSTON STREET, COR. GREENE,
New York City, April 28th, 1887.

To the QUARTERMASTER-GENERAL U. S. ARMY,
Washington, D. C.:

GENERAL: I have the honor to acknowledge receipt of your communication of the 6th inst. in relation to the claim of Dan'l Shea, and in reply beg to report as follows:

1. The damage done to the steamer "James Bowen" was as follows: Hull and decks stove in and otherwise damaged, boiler shifted and connections and machinery, &c., broken, and the vessel opened below the water line, so that she had to be run ashore to save her. The cost of repairing her was $7,312.34, of which the Government is asked to pay but $686.69. The bills for this amount ($159.69, $100.00, and $427.00) are forwarded herewith.

The last named is attached to the formal voucher for the hire of this boat. The explanation of the item for $100.00 is given in paper marked No. 2. I regard the bills as just and proper, and recommend that they be paid.

2. I personally visited the "James Bowen" shortly after she was docked and while the work on her was in progress. She was run into on January 1st, 1887, and at once laid up for repairs. The work was pushed forward and completed on the 2d of March, and she resumed her work in place of the quartermaster's boat "Atlantic" on the morning of March 3d, 1887. She was necessarily laid up for the required repairs, therefore, from January 1st to March 2d, 1887, inclusive, as I believe from the affidavit of the party who performed the bulk of the work, which is inclosed herewith, and also frequent inquiries made by me while the work was in progress.

10 3 and 4. The "James Bowen" was under charter to and employed by the Quartermaster's Department at the time of the collision, under the contract of Daniel Shea, dated May 28th, 1886. Immediately after the collision the contractor was called upon to furnish another vessel under this contract. He furnished the steamer "E. H. Webster," one of his own boats. That vessel, although a very staunch, good boat, was not entirely satisfactory for the service, and upon search the "Joseph Stickney" was found and put on the duty by the contractor.

The "E. H. Webster" was on duty from January 1st to 4th, inclusive, and the "Joseph Stickney" from January 5th to March 2d, 1887. During this time the "James Bowen" was undergoing repair of the damage done her in the collision. As the "James Bowen" was at the time wholly in charge and under the management and control of the Quartermaster's Department, I was under the opinion, and am still, that the Department was bound to save the contractor from loss on account of the damage and to pay for her time under the contract until restored to her owner upon completion of the repairs.

With this in view she was reported on my report of persons and articles for January at the contract rate, viz, $67.00 per day, including an engineer and fireman. Upon further reflection, however, I concluded to allow

for the "Bowen's" time only at the rate which her owner was obliged to pay for the vessel put in her stead. One of these, the "E. H. Webster," was his own, and was in service, as before stated, from January 1st to 4th, and the other, the "Joseph Stickney," was hired by him at $55.00 per day, and was in service from January 5 to March 2d. So the matter stands thus:

The "E. H. Webster" was in service from Jan'y 1st to 4th, and the "Joseph Stickney" from January 5th to March 2d, and has been paid for. The "James Bowen" was laid up from January 1st to March 2d, inclusive, and her time has not been paid for, but I recommend that her owner be paid at the rate of $55.00 per day for the vessel. I inclose here-
11 with a voucher covering the time, as well as the item for an engineer and a fireman, embraced in Shea's claim in Article 1 of this letter. If the Quartermaster-General desires, supplementary reports of persons and articles covering this service will be prepared and forwarded immediately.

Very respectfully, your ob't servant,

(Signed) HENRY C. HODGES,

Lieut. Col. & Deputy Q. M. General, U. S. A., Depot Quartermaster.

12 II. GENERAL TRAVERSE.

Filed Nov. 24, 1888.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

13 III. FINDINGS OF FACT.

Filed Dec. 8, 1890.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant and the defendants (by Colonel Hodges, a deputy quartermaster-general of the Army) entered into a written contract, of which the following is a copy:

"Articles of agreement entered into this twenty-eighth day of May, eighteen hundred and eighty-six, between Lieut. Colonel Henry C. Hodges, deputy quartermaster-general, United States Army, of the first part, and Daniel Shea, of the county of New York, State of New York, of the second part.

"This agreement witnesseth that the said Lieut. Col. Henry C. Hodges, deputy quartermaster, U. S. Army, for and in behalf of the United States of America, and the said Daniel Shea, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

"ARTICLE 1. That the said Daniel Shea shall provide and furnish to the party of the first part, whenever called upon during the fiscal year ending June thirtieth, eighteen hundred and eighty-seven, such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service for the U. S. Army between New York city and Governor's Island, New York, Governor's Island and Sandy Hook, and New York Harbor generally, respectively, the steamer 'Atlantic,' 'Ordnance,' and 'Chester A. Arthur;' that the vessels furnished as aforesaid must each have an engineer and fireman and conform to the following conditions, viz: The steamer to take the place of the 'Chester A. Arthur' must be of about the size and the character of the 'Chester A. Arthur,' and the steamers to take the places of the 'Atlantic' and 'Ordnance,' respectively, must have the capacity for freight and passengers and be of the size and character of the steamer 'James Bowen;' and that all the vessels furnished must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirement of the law.

"It is further agreed that the fuel required by said vessels so furnished while in service, under this agreement, shall be supplied by the Government, and that this contract shall commence on the first day of July, eighteen hundred and eighty-six.

"And it is further agreed that the party of the second part shall furnish when required the remainder of the crew, consisting of a captain, a mate, two deckhands, and a fireman.

"ARTICLE 3. That it is expressly agreed and understood that this contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available.

"ARTICLE 4. That for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part shall be paid at the office of the disbursing quartermaster U. S. Army, at New York city, as follows: The sum of sixty-seven (67) dollars per day for each vessel employed, including the engineer and the fireman, when employed by the day, and the sum of ten (10) dollars per hour for
14 each vessel employed, including the engineer and the fireman, when employed by the hour; and for the said remainder of the crew, when required, the sum of thirteen dollars per day.

"ARTICLE 5. That in case of failure of the said party of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to hire vessels elsewhere in open market at the sole expense and charge of the party of the second part.

"ARTICLE 6. Neither this contract nor any interest therein shall be transferred by the said Daniel Shea to any other party or parties, and any such transfer shall cause the annullment of the contract so far as the United States is concerned; all rights of action, however, for any breach of this contract by the said Daniel Shea are reserved to the United States.

"ARTICLE 7. No member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

"ARTICLE 8. This contract shall be subject to approval of the quartermaster-general U. S. Army.

"In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

"Article 2 stricken out before execution.

"HENRY G. HODGES, [L. S.]
"*Deputy Quartermaster-General, U. S. A.*
"DANIEL SHEA. [L. S.]

"Witnesses:
"HUGH SIEBERG.
"GEORGE F. OTIS.

"Approved:

"S. B. HOLABIRD,
"*Quartermaster-General, U. S. Army.*

"JUNE 9, 1886."

II.

After the making of said contract, and before the expiration of the fiscal year (June 30, 1887), upon being called upon by the Quartermaster's Department therefor, the claimant provided and furnished a vessel called the James Bowen, then stanch, in first-class order in every respect, well equipped, and conforming fully to the requirements of the law, and with such part of the crew as the claimant was required by the contract to furnish, and the same was accepted and used by the defendants.

III.

On the first day of January, 1887, while in the service and under the exclusive management and control of the Quartermaster's Department, and having an unlicensed captain or pilot, said vessel was damaged in a collision with a ferryboat, in consequence of which she was necessarily laid up for repairs until March 2 of the same year, when on the next day she resumed work.

The collision occurred during a fog, and the supervising inspectors, on an investigation, found that it was accidental and was not due to inattention, unskillfulness, or lack of precaution on the part of the pilots. The cost of repairs was paid by the claimant.

During the time said vessel was undergoing repairs, the claimant, being called upon therefor, furnished another vessel under said contract, for which he paid $55 a day. During said time the engineer and fireman of the claimant were on the vessel watching and superintending the work.

15 IV.

About April 1, 1887, Deputy Quartermaster-General Hodges forwarded to the Quartermaster-General a voucher, of which the following is a copy:

The United States to Daniel Shea, Dr.

Place and date.		Dols.	Cts.
N. Y. City, April 1, 1887.....	For hire of the steamer James Bowen, from Jan'y 1st to March 2d, 1887, inclusive, 61 days, at $55 per day.....	$3,355.00	
	Engineer and fireman, 61 days, at $7.00 per day	427.00	
		3,782.00	

The vessel was hired under contract of Daniel Shea, dated May 28, 1886. She was damaged in collision on January 1, 1887, while in the service and under the charge and exclusive management of the Quartermaster's Department. The period covered by this voucher is for the time the James Bowen was necessarily laid up for repairs of said damage. The contract rate for the boat is $67 per day, including an engineer and fireman, but, in view of the Bowen being laid up, the rate is reduced to $55 per day for the boat, and $7.00 for the engineer and fireman during the period. The engineer and fireman were on the boat supervising the work and watching the boat, as is customary in such cases.

Appropriation for fiscal year ending June 30, 1887.

I certify that the above account is correct and just; that the services were rendered as stated; that they were necessary for the public service, and are borne on my report of persons, &c., for the month of .

HENRY C. HODGES,
Deputy Q. M. General, U. S. A.

Said voucher was accompanied with a recommendation that authority be granted to pay the same, accompanied with the following explanations:

The facts are as stated herein. The James Bowen was under charter to the Quartermaster's Department, and, as the Quartermaster-General is aware, was, on the 1st of January, 1887, on one of her trips between the Battery and Governor's Island, run into by the Brooklyn ferryboat Atlantic.

The James Bowen was at the time under the exclusive control and management of the Government, being manned and navigated by employés of the Quartermaster's Department.

In the collision the James Bowen was very badly damaged, and while undergoing repairs her owner was compelled to hire a vessel in her stead. The within claim is made for reimbursement of that expense. I regard it as perfectly proper, reasonable, and just, and therefore recommend its payment.

HENRY C. HODGES,
Deputy Q. M. Gen., U. S. Army, Depot Quartermaster.

On the 6th of April, 1887, the Quartermaster-General called upon the deputy quartermaster-general for further particulars, and received the following reply:

NEW YORK DEPOT OF THE QUARTERMASTER'S DEPARTMENT,
HOUSTON STREET, COR. GREENE,
New York City, April 28th, 1887.

To the QUARTERMASTER-GENERAL, U. S. ARMY,
Washington, D. C.:

GENERAL: I have the honor to acknowledge receipt of your communication of the 6th inst. in relation to the claim of Dan'l Shea, and in reply beg to report as follows:

1. The damage done to the steamer James Bowen was as follows: Hull and decks stove in and otherwise damaged, boiler shifted and connections and machinery, etc., broken, and the vessel opened below the water-line, so that she had to be run ashore to save her. The cost of repairing her was $7,312.34, of which the Government is asked to pay but $686.69. The bills for this amount ($159.69, $100.00, and $427.00) are forwarded herewith.

16 The last named is attached to the formal voucher for the hire of this boat. The explanation of the item for $100.00 is given in paper marked No. 2. I regard the bills as just and proper, and recommend that they be paid.

2. I personally visited the James Bowen shortly after she was docked and while the work on her was in progress. She was run into on January 1st, 1887, and at once laid up for repairs. The work was pushed forwarded and completed on the 2d of March, and she resumed her work in place of the quartermaster's boat, Atlantic, on the morning of March 3d, 1887. She was necessarily laid up for the required repairs, therefore, from January 1st to March 2d, 1887, inclusive, as I believe from the affidavit of the party who performed the bulk of the work, which is inclosed herewith, and also frequent inquiries made by me while the work was in progress.

3 and 4. The James Bowen was under charter to and employed by the Quartermaster's Department at the time of the collision under the contract of Daniel Shea, dated May 28th, 1886. Immediatly after the collision the contractor was called upon to furnish another vessel under this contract. He furnished the steamer E. H. Webster, one of his own boats. That vessel, although a very staunch, good boat, was not entirely satisfactory for the service, and, upon search, the Joseph Stickney was found and put on the duty by the contractor. The E. H. Webster was on duty from January 1st to 4th, inclusive, and the Joseph Stickney from January 5th to March 2d, 1887. During this time the James Bowen was undergoing repair of the damage done in the collision. As the James Bowen was at the time wholly in charge and under the management and control of the Quartermaster's Department, I was under the opinion, and am still, that the Department was bound to save the contractor from loss on account of the damage and to pay for her time under the contract until restored to her owner upon completion of the repairs.

With this in view she was reported on my report of persons and articles for January, at the contract rate, viz, $67 per day, including an en-

gineer and a fireman. Upon further reflection, however, I concluded to allow for the Bowen's time only at the rate which her owner was obliged to pay for the vessel put in her stead. One of these, the E. H. Webster, was his own and was in service, as before stated, from January 1st to 4th, and the other, the Joseph Stickney, was hired by him at $55.00 per day, and was in service from January 5 to March 2d. So the matter stands thus:

The E. H. Webster was in service from Jan'y 1st to 4th, and the Joseph Stickney from January 5th to March 2d, and has been paid for. The James Bowen was laid up from January 1st to March 2d, inclusive, and her time has not been paid for, but I recommend that her owner be paid at the rate of $55.00 per day for the vessel. I inclose herewith a voucher covering the time, as well as the item for an engineer and a fireman, embraced in Shea's claim in article 1 of this letter. If the Quartermaster-General desires, supplementary reports of persons and articles covering this service will be prepared and forwarded immediately.

Very respectfully, your ob't servant,

HENRY C. HODGES,
Lieut. Col. and Deputy Q. M. General, U. S. A.,
Depot Quartermaster.

May 17, 1887, the Quartermaster-General transmitted the claim and voucher to the Third Auditor of the Treasury for adjudication and settlement by the accounting officers.

V.

November 29, 1887, the Auditor reported against allowing and paying the claim on the alleged ground that "the boat was wholly under the control of the owner and his agents and employés, and if the injury had been due to the negligence of any one connected with the management of the James Bowen, and not due to the ferryboat (with which the collision occurred), the United States could not be charged with that negligence." The Second Comptroller on the same day concurred with the Auditor in disallowing the claim, and it has not been paid.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of $4,087.

17 IV. OPINION.

RICHARDSON, Ch. J., delivered the opinion of the court:

The claimant entered into a written contract wherein it was agreed that he should provide and furnish to the defendants, whenever called upon during the fiscal year ending June 30, 1887, such vessels, of the description specified, as might be required to take the place of other vessels then performing service for the United States Army between New York City and Governor's Island; and that the vessels furnished should be staunch, in first-class order in every respect, well equipped, and should conform fully to the requirements of the law.

"The defendants, on their part, agreed to furnish the fuel required for the vessel, and that for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part [the claimant] shall be paid, at the office of the disbursing quartermaster, U. S. Army, at New York City, as follows: The sum of $67 per day for each vessel employed, including the engineer and fireman, when employed by the day, and the sum of $10 per hour for each vessel employed, including the engineer and the firemen, when employed by the hour; and for the said remainder of the crew, when required, the sum of $13 per day."

Within the time specified by the contract the claimant, being so called upon, provided and furnished a steam vessel called the James Bowen, which was accepted by the defendants' officers, and was thereupon put into the public service. While so employed under the exclusive management and control of said officers, having a captain or pilot not licensed as required on all vessels excepting public vessels of the United States, vessels of other countries, and canal boats (Revised Statutes, §§ 4400, 4438), said steamer collided with a ferryboat and was so damaged that she was laid up for repairs sixty-seven days, during which time the claimant provided and furnished another vessel, for which he paid $55 a day. The cost of repairs was paid by the claimant, and the vessel was put into the public service again upon their completion, and within the fiscal year specified in the contract.

The claim is for the contract price of $67 a day for sixty-one days the vessel was undergoing repairs.

The industrious counsel for the defendants insists that the case presented is one sounding in tort, for consequential damages resulting from a collision of which neither this court nor the accounting officers have jurisdiction, and he cites numerous authorities on the subject of liability in case of collision. He also urges that the damages complained of are in the nature of demurrage, on which subject he also refers to many adjudicated cases.

In our opinion the case is not one sounding in tort and there is no question of demurrage involved. The action is simply one of contract founded upon a written agreement between the parties, of which the court has undoubted jurisdiction and is to be determined upon the true interpretation of the written instrument which is in the nature of a charter party, and is subject to the rules applicable to such an instrument.

It is true that the written contract declared on has not all the usual formalities of a charter party, and is not technically drawn as such.
17½ A charter party is not required to be in any technical form nor even in writing, and it may be proved in whatever way the parties choose to make it. (Parsons on Maritime Law, Chap. VIII, Section I.) Like all other contracts, its meaning, force, and effect, when a controversy arises, are to be determined by the court upon the language employed in connection with the subject-matter, the surrounding circumstances, and the acts of the parties. (Gibbons Case, 15 C. Cls. R., 174; Otis Case, 19 C. Cls. R., 467; and Otis Case, 20 C. Cls. R., 315.)

We have no doubt that the parties intended by this contract that the defendants were to take such vessels as they required the claimant to provide and furnish and to keep the same to the end of the fiscal year specified, or at least for such time during that year as the exigencies of the

Government required the vessels. After acceptance of the vessel by the defendants they could not have surrendered her and freed themselves from further liability until the end of the fiscal year or at least until her use was no longer required during that time, and the claimant could not have withdrawn her during the same period. The defendants became the owners of the vessel for the time being. This is clear from the fact that they assumed the exclusive management and control of her, and they put her back into the public employment as soon the repairs were completed and during the fiscal year mentioned in the contract.

In Leary *v.* The United States (14 Wall., 607) Mr. Justice Field, speaking for the Supreme Court, said:

"There is no doubt that under some forms of a charter party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter party let the whole vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated."

When a vessel under charter is laid up for repairs in consequence of damage by collision the rights and liabilities of the parties as between themselves has been long well settled. The owner must pay the cost of repairs and the charterer must pay the contract price for the time the vessel was undergoing repairs, provided he was in possession, command, and control over its navigation, as in the present case, at the time of the collision.

As early as 1809 in Havelock *vs.* Geddes (10 East., 555), which was an action upon covenants in a charter party to pay for the hire of a vessel, Lord Ellenborough, in his opinion, laid down the rule of law thus:

"The question, then, is whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have the right to deduct anything out of the freight they have to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of the opinion they are not.

18 "From the accidents to which ships are liable it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain they should have stipulated to deduct for the time which might be exhausted in making those repairs if they meant to make that deduction. Without such a stipulation we think the true construction of the charter-party is, that whilst those repairs are going on the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

This decision has been frequently cited with approval by other courts, and the rule has been adopted and followed by the Second Comptroller of the Treasury as applicable to cases in which the United States are the charterers. (2 Digest of Decisions of Second Comptroller, secs. 1019, 1020.)

In the case of Leary vs. The United States, above cited, the defendants (The United States) were held not liable for the payment of the per diem after the collision and while the vessel was undergoing repairs, because by the contract the hiring was by the day at "$250 a day for each day that it might be retained under the charter." No time was specified directly nor by inference for the continuation of the hiring, the vessel was not in the exclusive management and control of the defendants when the collision occurred, and the owner resumed possession and took her from Port Royal, in South Carolina, to New York, where the repairs were done, and she was no longer required nor retained by the defendants under the charter.

The voucher returned in this case to the accounting officers by the quartermaster's department allowed only $55 a day, because that was the price paid by the owner for use of another vessel to take the place of the James Bowen while that vessel was laid up for repairs. That might be the proper measure of compensation if this were an action for damages suffered by the claimant in consequence of the acts of the defendants, but it is an action on a contract and the claimant is entitled to receive the contract price, which is $67 a day. What he paid for the use of a substitute boat has no more to do with the measure of damages than the cost to him of the injured vessel.

The claim seems to have been rejected by the accounting officers on the alleged ground that "the boat was wholly under the control and ma agement of the owner and his agents." This was a mistake of fact, now clearly established. Had the real fact then been made to appear, we may assume that those officers would have adhered to the former decisions of their offices.

Judgment will be entered for the claimant for the sum of $4,087.

19 V. JUDGMENT OF THE COURT.

At a Court of Claims held in the city of Washington, on the 8th day of December, A. D. 1890, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Daniel Shea, claimant, do have and recover of and from the United States the sum of four thousand and eighty-seven dollars ($4,087).

BY THE COURT.

VI. APPLICATION OF DEFENDANTS FOR ALLOWANCE OF APPEAL, AND ALLOWANCE OF SAME.

From the judgment rendered in the above-entitled cause on the 8th day of Dec'r, 1890, in favor of claimant, the defendants, by their Attorney-General, on the 22d day of January, 1891, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed in open court and allowed January 22, 1891.

WILLIAM A. RICHARDSON,
Chief Justice.

20 IN THE COURT OF CLAIMS.

DANIEL SHEA
vs.
THE UNITED STATES. } No. 16145.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, the opinion of the court, the judgment of the court, the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 29th day of January, A. D. 1891.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Supreme Court U. S., clerk's office. Received Feb. 27, 1891. Court of Claims. No. 396. The United States, appellant, *vs.* Daniel Shea. Filed February 27, 1891. 14501.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
vs.
DANIEL SHEA, APPELLEE.
No. 396.

BRIEF ON BEHALF OF THE APPELLANT.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
vs.
DANIEL SHEA, APPELLEE.
No. 396.

STATEMENT OF THE CASE.

On May 28, 1886, Lieut. Col. Henry C. Hodges, Deputy Quartermaster-General U. S. Army, for and in behalf of the United States of America, as party of the first part, and Daniel Shea, for himself, his heirs, executors, and administrators, as party of the second part, entered into a written contract, in and by which they—

> mutually *corenant and agree* to and with each other as follows, viz:
>
> First. That the said Daniel Shea *shall provide and furnish* to the party of the first part, *whenever called upon* during the fiscal year ending June 30, 1887, *such vessels*, of the *description* hereinafter given, *as may be required to take the place of the vessels now performing service for the U. S. Army* between New York City and Governors Island, New York, Governors

Island and Sandy Hook, and New York Harbor generally, respectively, the steamers *Atlantic*, *Ordnance*, and *Chester A. Arthur;* that the vessels furnished as aforesaid *must each* have an *engineer* and *fireman* and *conform to the following conditions*, viz:

The steamer *to take the place of the Chester A. Arthur* must be of *about the size and character* of the *Chester A. Arthur*, and the steamers *to take the places of* the *Atlantic* and *Ordnance*, respectively, *must have the capacity for freight and passengers and be of the size and character of* the steamer *James Bowen;* and that all the vessels furnished *must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirements of law.*

It is *further agreed that the fuel* required by said vessels so furnished *while in service under this agreement* shall be supplied by the *Government*, and this contract shall commence on the 1st day of July, 1886.

And it is *further agreed* that the party of the second part shall furnish *when required* the *remainder of the crew*, consisting of a captain, a mate, two deck hands, and a fireman.

Fourth. That *for and in consideration of the faithful performance of the stipulations of this agreement* the party of the second part shall be paid, etc., as follows:

The sum of $67 *per day* for each vessel *employed*, including the engineer and the fireman, *when employed* by the day, and the sum of $10 *per hour* for each vessel *employed*, including the engineer and the fireman, *when employed* by the hour; and for the remainder of the crew *when required*, the sum of $13 *per day.*

That in case of failure of the said party of the second part to comply with the stipulations of this

> contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to hire vessels elsewhere in open market at the sole expense and charge of the party of the second part. (Rec., pp. 7, 8.)

After the making of said contract and before the expiration of the fiscal year (June 30, 1887), upon being called upon by the Quartermaster's Department therefor, the appellee, Daniel Shea, provided and furnished a vessel called the *James Bowen*, then staunch, in first-class order in every respect, well equipped, and conforming fully to the requirements of the law, *and with such part of the crew* as the appellee was required by the contract to furnish, and the same was accepted and used by the appellant. (Rec., p. 9.)

On January 1, 1887, while in the service under said contract, said vessel, the *James Bowen*, was damaged in a collision with a ferryboat, in consequence of which said vessel, the *James Bowen*, was laid up for repairs from January 1, 1887, until March 2, 1887, when on the next day she resumed work.

The collision was accidental and was not due to inattention, unskillfulness, or lack of precaution on the part of the pilots. (Rec., p. 9.)

The cost of repairs was paid by the appellee, Daniel Shea (Rec., p. 9.) As soon as the accident happened the vessel was laid up by the appellee for repairs. During the time the *James Bowen* was being repaired the engineer and fireman of the appellee, Daniel Shea, were on the vessel, the *James Bowen*, watching and superintending the work, and during the time said vessel

was undergoing repairs the appellee, Daniel Shea, *being called upon therefor furnished another vessel under said contract* (Rec., p. 9.) It is evident that the *James Bowen* was repaired by appellee's and not by appellant's shipbuilders. (Rec., p. 11.) The damage done to the steamer *James Bowen* was as follows: Hull and decks stove in and otherwise damaged, boiler shifted and connections and machinery, etc., broken, and the vessel opened below the water line, so that she had to be run ashore to save her. She was *run into* on January 1, 1887, and *at once laid up for repairs.* The work was pushed forward and completed on March 2, 1887, and she *resumed her work in place of* the Quartermaster's boat *Atlantic* on the morning of March 3, 1887. She was necessarily laid up for repairs, therefore, from January 1 to March 2, 1887, inclusive. *Immediately after the collision the contractor, Daniel Shea, was called upon to furnish another vessel under this contract.* He furnished the steamer *E. H. Webster*, one of his own boats. That vessel, although a very staunch, good boat, was not entirely satisfactory for the service, and, upon search, the *Joseph Stickney* was found and put on duty by the contractor. The *E. H. Webster* was put on duty by the contractor from January 1 to 4, inclusive, and the *Joseph Stickney* from January 5 to March 2, 1887, and *the entire time that these vessels were in service has been paid for by the Government to the contractor*, Daniel Shea. (Rec., p. 12.)

After having been paid under said contract the full per diem of $67 for the *E. H. Webster* and *Joseph Stickney* for the time of their service, from January 1, 1887, to

March 2, 1887, inclusive, the contractor, Daniel Shea, then presented a claim for compensation for the *James Bowen*, at the rate of $67 a day for the same period, from January 1, 1887, to March 2, 1887, inclusive, during which she was being repaired, and whilst she was, as a matter of fact, *not employed* under said contract.

On April 1, 1887, appellant presented a claim for $4,087 for the time the *James Bowen* was laid up for repairs to the Quartermaster's Department. The Deputy Quartermaster-General recommended the allowance of $3,782; but the whole claim was disallowed by the accounting officers.

ASSIGNMENT OF ERRORS.

First. The court erred in finding as a conclusion of law that the claimant was entitled to recover the sum of $4,087.

Second. The court erred in rendering judgment in favor of the claimant and against the United States for the sum of $4,087.

Third. The court erred in holding that it had jurisdiction of claimant's cause of action.

BRIEF OF ARGUMENT.

Any recovery in this cause must of course rest on the contract and upon contract liability.

It is needless to argue the often-decided proposition that no recovery can be had for damages resulting from the lack of ordinary care owed by a bailee or from any

other form of negligence. Such liability would sound in tort and be excluded by the express provision of the statute conferring jurisdiction on the Court of Claims.

Turning, then, to the contract, we find that the claimant contracted whenever called upon to furnish no specific vessel, but any vessel he chose possessing specified qualifications, and the number of them required to perform certain work of the Quartermaster's Department, evidently well understood by both parties, either by the day or by the hour as the Government officers saw fit to employ them. These vessels were to be equipped by the claimant with engineer and fireman in all cases, also with captain, mate, and crew when requested.

The Government on its part stipulated only to furnish coal and to pay for days or hours when such vessels were actually employed, $67 per day or $10 per hour.

The rule undoubtedly is that where the owner of a vessel transfers the entire possession and control to another for a given time or voyage, and constitutes such other temporary or special owner, there results to the transferee the duties and responsibilities of ownership, among which might be classed the duty to repair injuries occurring during possession of the vessel.

The first question is, whether this contract constituted a mere hiring of the use of this vessel to do certain work, or a complete *demise* sufficient to *divest ownership* for the time.

What is the proper construction of the contract of May 28, 1886? The court below has treated it as though it was a *demise* of the steamer *James Bowen* to the United

States for the fiscal year ending June 30, 1887, and made the United States her special owner for said year. And such is the contention of the appellee.

But this it is submitted is not the true or proper construction of that contract.

To have that effect a contract must be such as of *itself* to transfer the *title* and *ownership* of some particular vessel to a party as grantee or lessee for a voyage or for some definite period or time of service mentioned in the contract.

It must give the grantee or lessee a right to that particular vessel for and during the time specified as against the grantor or lessor. This court has said:

> *Unless the ship herself is let to hire*, and the owner parts with the possession, and command and navigation of the same, the *charterer or freighter is not to be regarded as the owner for the voyage.* * * * Courts of justice are not inclined to regard the contract as a *demise of the ship* if the end in view can conveniently be accomplished without the *transfer of the vessel to the charterer.* (*Reed* vs. *The United States*, 11 Wall, 601.)

The contract of May 28, 1886, contains no words of *demise*. It contains no words *granting* or *letting* the steamer *James Bowen*. It does not name any *particular vessel*, or any *definite time*. On the contrary it sounds in *contract and covenant merely*. Instead of saying that the one party *grants* or *lets* to the other such and such vessels for such a voyage or voyages, or during such a time or times, it begins by saying that the parties to it "do by these presents *mutually covenant and agree* to and with each other

as follows." It then proceeds to state the things which Shea *covenants and agrees to do.* He covenants and agrees that he "*shall provide and furnish*" to Hodges, etc., "*whenever called upon*" during the fiscal year, "*such vessels*" of the description mentioned "*as may be required*" to take the place of three designated vessels at that time performing service for the U. S. Army between certain points mentioned. It is clear that after providing and furnishing three steamers such as were required and called for under said contract, he could at any time withdraw any of them, or all of them, and provide and furnish any other vessels he might please, so long as such other vessels came up to the standard of, and conformed to, the requirements of said contract. And as long as the vessels provided and furnished were such as said contract called for, and performed the service called for, the Government could not sue the contractor for breach of contract merely because he had chosen to withdraw a vessel that had been serving under the contract and put in her place another such as the contract called for.

The language in which this contract is couched was clearly intended to permit the contractor to furnish *any vessels he pleased,* and to change them whenever he pleased, so long as they performed the service contracted for and came up to the standard and conformed to the requirements of the contract, and were such as the contract called for. Had it been contemplated that the Government should by this contract acquire any right, title, or ownership in any particular vessel during the fiscal year, or during any part of said year, it would necessarily have been couched in very different language.

Could the Government have insisted that any *particular vessel* which had entered upon the contract service should continue to perform the contract service during the rest of the year if the owner did not wish her to do so, and desired to withdraw her, and was ready and willing to furnish another vessel such as the contract called for? It is submitted that the Government could not insist upon anything of the kind, and for the obvious reason that it would have no right to or ownership in any *particular* vessel.

Even where words of demise are used, yet it must appear that the instrument taken as a whole was intended to operate as such or it will not be so construed.

> When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise, yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an *agreement only*. (*Christie* vs. *Lewis*, 2 Broderip & Bingham, 436; *Morgan* vs. *Bessell*, 3 Taunton, *72.)

Just here it should be observed that the contract provided that "the vessels furnished must each have an engineer and fireman." (Rec., p. 8.) And the court finds that the contractor, Daniel Shea, "provided and furnished the *James Bowen with such part of the crew* as the claimant was required by the contract to furnish." (Rec., p. 9.)

The appellant may well be said, therefore, to have retained the ownership of the *James Bowen* by retaining in any event his own engineer and fireman upon her. Even though the *James Bowen*, at the time of the collision, was found by the court to have been under the "*exclusive management and control of the Quartermaster's Depart-*

ment," yet this is not equivalent to finding a special ownership in the Government. It will be observed that in this connection the word "possession" or the word "ownership" is nowhere used.

In the findings of fact the court says, "while in the service and *under the exclusive management and control of the Quartermaster's Department* said vessel was damaged, etc." (Rec., p. 9.)

Now, the *management and control* is one thing, and the *ownership* is another thing. They may concur, but do not have to concur. Where a carriage is hired *together with the driver*, the possession and ownership is in the general owner, *although the driver is subject to the orders of the hirer*. Both the carriage and driver are under the *management and control* of the hirer; but it is otherwise as to the *ownership*, for in case of collision without fault of the hirer, the owner must bear the responsibility or loss. It would only be a case of *bailment for hire* at most.

Where, as in the case at bar, the contract contains no words of demise, and especially where its provisions are *inconsistent* with an intention to give any *ownership* to the hirer, it will be held to be a mere contract of *affreightment or bailment for hire* at most.

In Saville *vs.* Campion, there being no express words of *demise* of the *ship itself* in the charter party, the court held that the freighter did not thereby become the *owner* for the voyage; but that the possession continued in the owner, and the court in giving its reason says:

> The whole instrument contains matter of contract and covenant only. (*Saville* vs. *Campion*, 2 Barnewall & Alderson, 511.)

And such is the case where a charter-party contains words of demise, if it contains *covenants or provisions* which are *inconsistent* with the idea of *letting the vessel itself.*

In Christie *vs.* Lewis, the court held that the instrument was *not a demise*, although it contained *words of letting*, because of its other provisions being inconsistent with such an intent.

In its opinion the court said:

> It is true, in the outset, the owner states he *has granted and to freight let*, and that the freighter *hath hired and to freight taken;* but these instruments are to be taken together and we are to see whether, upon the whole, the parties intended to part with the possession.

And after quoting the covenants the court, continuing, says:

> These covenants would be perfectly nugatory if the freighter had the entire possession of the ship, for then he would receive, stow, and deliver as and when he pleased. (Citing *Saville* vs. *Campion*, *supra*) *Christie* vs. *Lewis*, 2 Broderip and Bingham, 438.)

A charter party will not be held to be a *demise* of the vessel itself unless, taken as a whole, the *ownership* of the general owner is divested.

> Where the general owner, etc., contracts to carry a cargo on freight, for the voyage, the charter party is considered as a mere affreightment, *sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.* * * * The whole charter party, except the introductory clause, *sounds merely in covenant.* The *ownership*

was not divested by the *covenant of affreightment*. (*Marcadier* vs. *Chesapeake Insurance Company*, 8 Cranch, 48, 49).

And the supreme court of New York, after quoting the above, say:

> The construction must be on the whole instrument in order to determine whether the owner intended to part with the possession. The first clause declares that the parties of the first part had agreed *to freight and to let* to the party of the second part the whole of the schooner *Thetis*. This expression, taken singly, would undoubtedly import that Douglass has possession and control of the vessel. In *Marcadier* vs. *The Chesapeake Insurance Company* the language is substantially the same. The charter party contained these words: *Hath granted and to freight let* the brig, excepting and reserving her cabin for the accommodation of the captain. Yet the court held that the *ownership and possession* were retained by the general owner, in consequence of subsequent clauses, which compare with those in the charter party in question.
>
> The second and third clauses are that the party of the second part may load and discharge from on board the schooner such cargo, in either of the ports or places, as by them shall be ordered; and that the party of the second part agrees to deliver and receive the cargo or parts thereof, as may be, at all and every place, alongside and within reach of the vessel's tackles, she having first anchored.
>
> It seems to me that these clauses are *inconsistent with the idea of actual ownership and possession of the freighter*. If that had existed, there was *no necessity* for such stipulations; but, on the ground that the general owners (although stipulating that

> the vessel should be *employed* for the voyage in carrying freight for the charterer) still retained possession and control of the vessel, the clauses are intelligible and proper in requiring the charterer to conform to them. (*Clarkson* vs. *Edes*, 4 Cowen, 476, 477.)

In the case of *Leary* vs. *The United States*, the Government agreed to charter and hire the vessel from Leary at $250 *a day for each day* that it might be retained under the charter, Leary engaging that she should be kept *tight, staunch*, etc., and provided with every requisite and with men, etc., necessary; and the Government to supply the coal; and that in case the vessel whilst executing orders of the Government, should be destroyed or damaged, etc., by being compelled by the Government *to run any extraordinary marine risk*, then Leary was to be indemnified, but containing no contract provision as to damages from ordinary risks. While under charter the vessel was injured by a risk which the court held to be ordinary and not extraordinary.

On appeal this court said:

> All the cases agree that *entire* command and possession of the vessel and consequent control over its navigation must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The provisions which the charter party contains on the part of the owners *sound only in covenant.* * * * Stipulations here designated on the part of the owners imply the possession and command of the vessel by them, and would be *inconsistent with* such possession and command by the Government and *out of place and inappropriate if the Government were special owner of the vessel for the*

service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's Bench in *Saville* vs. *Campion*, 2 Barnwell and Alderson, 511, and by the supreme court of New York in *Clarkson* vs. *Edes*, 4 Cowen, 477. In each of these cases they were held *conclusive* that the *possession and control* of the vessel had *not passed to the charterer*, but had been *retained by the general owner*. The risk that the vessel incurred in complying with the orders of the harbor-master was not an *extraordinary* marine risk within the meaning of the charter party. * * * The contract of the Government was not intended to apply to the usual risks attendant upon the performance of a service such as was here mentioned, but risks outside and beyond them. *The risk incurred was of a possible collision with a sunken anchor in the harbor. This was an ordinary risk which every vessel must run that enters a harbor.*

In conclusion, it was held by this court that no recovery could be had. (*Leary* vs. *The United States*, 14 Wall., 611, 612, 613.)

The construction of the contract of May 28, 1886, which the appellant contends for, namely, that it is *not a demise* of the *James Bowen* and does not make the appellant special owner during the fiscal year ending June 30, 1887, or during the time of service, is borne out by all the other covenants and provisions of the contract.

The vessels are to be employed "*by the day*" or "*by the hour.*" The contractor, Daniel Shea, covenants and agrees that "all the vessels furnished *must be staunch, in first-class order in every respect, well equipped*, etc."

(Rec., p. 8), and that he "shall provide and furnish * * * such vessels * * * *whenever called upon during the fiscal year ending June* 30, 1887." And it is also covenanted and agreed "that *in case of failure* of the said party of the second part (Daniel Shea) *to comply with the stipulations of this contract,* according to the true intent and meaning thereof, then the party of the first part (the appellant) shall have the power *to hire vessels elsewhere in open market* at the sole expense and charge of the *party of the second part.* (Rec., p. 4.)

The service which the Government was to receive was such that it could be secured by *hiring* other vessels.

Can it be pretended for a moment that the contractor could *provide and furnish* to the Government any vessels of which the Government had the *special ownership.* He would not be providing and furnishing the Government a vessel if the Government already had that very vessel. He could only do so upon the theory that the Government did not have ownership under said contract. The requirement that the contractor should furnish such vessels *whenever called upon* during the fiscal year is entirely *inconsistent with the idea of any ownership in the Government.*

What would be the use of the provision that "in case of failure of the contractor to comply with the stipulations of this contract, the Government shall have the power to hire vessels elsewhere in open market at the sole expense and charge of the contractor," if the contractor could say that she was all right when he originally furnished her, and that because the Government had accepted her he was not obliged to furnish in her place a vessel that was staunch

and in first-class order, etc. These provisions are wholly *inconsistent with the idea of any ownership in the Government.*

Article 5 of the contract clearly indicates that Shea was considered as a mere contractor, and that, except for said article, if he broke his contract the Government would have been put to the delay and inconvenience of an action of covenant against him, and this provision was undoubtedly inserted to save the Government from such inconvenience and delay on the part of a defaulting contractor. If the Government be treated as having a special ownership upon acceptance of a vessel, this provision (article 5) would be meaningless and useless during all the rest of the year. The provision, also, that the fuel should be furnished by the Government would have been entirely unnecessary if the Government were, by the terms of the contract, special owner of the vessel. The provision, also, for the contractor furnishing the engineer and firemen in any event, and the *rest of the crew* when required, is inconsistent with the idea that the contract was intended as a demise of the vessel. When the rest of the crew were furnished by the contractor no one would pretend that the contract could be treated as a demise of the vessel itself—an entire surrender of possession. Can it be supposed that the construction of this contract should vacillate from day to day; that on one day it would be construed as a demise and on the next day as *not* a demise?

It can not be contended for a moment that the *entire possession and control* of the vessels were surrendered by claimant. At all times his engineer and fireman were at

least in partial possession, as evidenced by their management of the repairs.

In conclusion, we submit that, taking this contract of May 28, 1886, as a whole, sounding as it does in *contract and covenant merely*, containing *no words of letting*, designating *no particular vessel*, designating *no definite time* of service, and with its *covenants and provisions inconsistent with the idea of any special ownership* in any *particular* vessel being given to the Government, it is clear that it should be construed *not to be a demise* of the *James Bowen*, and should be held to be *a mere contract of affreightment*, or *bailment for hire* at most.

The appellant did not in said contract undertake any responsibility beyond that which may be implied by the law of *bailment*.

In *Clark* vs. *United States* the contract for the use of the claimants' vessel, and for the payment of her value if she should be lost in the service of the Government, was *not* reduced to writing. *When in that service she was manned by a captain and crew furnished by the Quartermaster's Department and lost.* This court says:

> In the present case the implied contract is such as arises upon a *simple bailment for hire*, and the *obligations* of the parties are those which are *incidental to such a bailment*. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract. *This will cast the loss of the vessel upon him. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed.* This is not only the common law, but the general

law on the subject. As *negligence is not attributable to the employés of the Government* in this case, *the loss of the vessel*, as before stated, *must fall on the owner*. (*Clark* vs. *United States*, 95 U. S., 542, 543.)

The rule is well settled that where a collision takes place by inevitable accident, or without blame being imputable to either party, the loss rests where it falls, and must be borne by the party on which it happens to light. (1 Parsons on Shipping and Admiralty, 525.)

In *Shaw* vs. *United States* a notice from the assistant quartermaster at St. Louis was given to the captain of a vessel that the Government would require its service for a trip to Memphis, Vicksburg, and other points, accompanied with a statement of the *per diem* compensation which would be allowed for its use, etc., and for the fuel for the vessel, to which notice and service no objection was made by the captain or the claimant. It also appeared that the claimant entered upon the service with alacrity, and the service was rendered. Whilst returning from the trip the steamer was *destroyed by fire without fault* of claimant. The court say:

Under these circumstances the transaction could only be treated as a voluntary arrangement, notwithstanding the peremptory tone on the part of the assistant quartermaster-general with which the negotiation with the captain was opened. * * * *As charterers of the vessel under such a contract the United States were not liable to the claimant for its loss.* (*Shaw* vs. *United States*, 93 U. S., 239, 241.)

By the general principle of the law of hiring of things, the hirer is bound to take the same care for the preservation of the thing that a *prudent man* takes

> of his *own* property of a *like* nature under *like* circumstances. It is a contract of *mutual interest.* The hirer is benefited by the use of the thing, and the lender by the hire or rent paid. The hirer is *not liable as common carrier* for loss by every sort of accident except act of God, *neither is he bound for that extreme care and diligence*, that one is, who has the use of a thing by a *gratuitous* loan and the whole benefit of the contract is on one side, and the burden on the other. But the liabilities of the hirer may be varied or enlarged by the terms of the contract and the agreement by which this vessel was hired was special. She was hired by a charter party by which *the hirer covenanted to return her on the expiration of the service to the owners in like good condition as when she sailed, etc.* (*Merrill* vs. *Arey*, 3 Ware, 217.)

In the case at bar the contractor Shea has not protected himself against loss or damage to his vessel while in service by inserting any such provision in the contract. The Government has not agreed to return the vessel in good order or in the like condition in which it received her, and in the absence of an *express* agreement to that effect can not be held liable for not doing so in case of an *unavoidable accident* occurring *without negligence or fault* on the part of the Government. Indeed the word "return" is not used in the contract anywhere and probably for the reason that the parties did not consider that the Government had any ownership in the vessel to give up. Nothing short of an express provision in the contract, and couched at that in language which shows an intention on the part of their hirer to assume the burden of *more* than ordinary care would suffice to render the hirer responsible

for loss or damage occurring by reason of *unavoidable accident without his fault or negligence.* (*Ames* vs. *Belden*, 17 Barb. (N. Y.), 516, 517, 518.)

Now, in the case at bar Deputy Quartermaster-General Henry C. Hodges says that "the *James Bowen* was, on the 1st day of January, 1887, on one of her trips, etc., *run into* by the Brooklyn ferryboat *Atlantic.*" (Rec., p. 10.) And, although the court finds that the *James Bowen* had an unlicensed captain or pilot at the time she was damaged, yet the court further finds as follows:

> The collision occurred during a fog, and the supervising inspectors, on an investigation, found that it was *accidental and was not due to inattention, unskillfulness, or lack of precaution on the part of the pilots.* (Rec., p. 9.)

It is manifest, therefore, that the fact of her having an *unlicensed* captain or pilot is *wholly immaterial*, for it in no way caused or contributed to the accident.

> The *Blue Jacket*, 144 U. S., 389, 390;
> S. P. The *Farragut*, 10 Wall., 334;
> The *Dexter*, 23 Wall., 70;
> *Shirley* vs. *The Richmond*, 2 Woods C. Ct., 58;
> The *Buckeye*, 11 Biss. C. Ct., 94;
> The *Tillie*, 13 Blatchford C. Ct., 518.

The case at bar is, therefore, one in which the collision between the *James Bowen* and the ferryboat was an *unavoidable accident* which occurred without fault or negligence on the part of anyone—the court having expressly found that "*it was accidental, and was not due to inattention, unskillfulness, or lack of precaution*" on the part of either vessel. (Rec., p. 9.)

Such being the case, it is clear that the Government, not having assumed any liability in or by its contract for any injury or damage to the *James Bowen*, and not having undertaken to return her in good order, and not having been guilty of any negligence or want of care which either caused or contributed to the accident, could not in any possible way be held liable for, or responsible for, the injury or damage which resulted from the collision.

No claim is made in this case for the damages sustained by the steamer *James Bowen* or for the cost of her repairs, and upon authority none could have been made, because such a loss occurring without fault fell upon and had to be borne by Shea, the contractor, and not by the Government.

But the claim is made by the appellee that he is entitled to the *per diem* compensation of $67 a day for the sixty days the *James Bowen* was being repaired.

During this period the appellee was under the obligation, by the terms of his contract, of providing and furnishing, whenever called upon, a vessel that was "*staunch and in first-class order, etc.*" The rule is familiar that where a party by his own contract creates a duty or charge upon himself he is bound to make it good, notwithstanding accident or inevitable necessity, *because he might have provided against it by his contract.* The *James Bowen* was *not* "*staunch or in first-class order*" during that period, and hence the appellee was under the obligation of furnishing another vessel such as would come up to the requirements of the contract. If he had failed to do so he would not only have broken his contract, but would have lost his right to any *per diem* so long as he remained in

default. The *per diem* compensation was only to be paid upon the *faithful performance* of the stipulations of the agreement. Unless a suitable and proper vessel was *provided and furnished* and unless she *rendered the service* no compensation was earned. The fact that the *James Bowen* was damaged in no way prevented the appellee from furnishing a vessel in accordance with the terms of this contract. And the most significant fact is that immediately upon the *Bowen* becoming unfit the Government demanded in performance of the contract that it be supplied with another vessel, which demand was acceded to by claimant, and a vessel furnished, and pay demanded and received for the same *under the contract.*

"Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it, which the defendant rejected, or his readiness to fulfill the condition until the defendant discharged him from so doing or prevented the execution of the matter which the contract required him to perform. * * * If the ship be disabled from completing her voyage the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded." (*The Tornado*, 108 U. S., 352; *McKee* vs. *Hecksher*, 10 Daly (N. Y.), 393.)

In a case in the circuit court Mr. Justice Jackson said:

> Charter parties like the present are to be construed liberally, as mercantile contracts usually are, in furtherance of the real intention of the parties; and the

> respondents, having by this undertaking *charged themselves with an obligation or service possible to be performed, must make it good*, unless performance was rendered impossible by the act of God, the law, or by the libelant. *Unforeseen difficulties or obstacles, however great, will not excuse them. They should have been guarded against by express conditions or qualifications in the contract.* (*The B. F. Bruce*, 50 Fed. R., 123.)

In another case the court say:

> Unless he (the charterer) has *contracted to become responsible for delay* or is in some way *blamable* for the loss of time, he is not subject to charge on that account. * * * If (the owner) is not satisfied to do this (*i. e.*, to take the risk of delay) *he should have guarded* against the danger by *stipulation* for demurrage. This was his *only* remedy. He did not, however, do it. His claim for demurrage must, therefore, be dismissed. (*The Mary Riley* vs. *Three Thousand R. R. Ties*, 38 Fed. R., 255.)

In *Goodwin* vs. *United States* the claimant had chartered a schooner to the United States at a fixed *per diem*. The United States agreed to pay $50 per day for the time the vessel was *engaged in their service*. The claimant sought to recover the *per diem* during one hundred and forty-four days in which the vessel had been detained by the marshal of the United States on a libel filed against her.

The court say:

> The claim of *per diem* compensation for the time the marshal held the vessel is the only ground of controversy between the parties, and it is the only subject open for examination in this case. During

> that time she was in the custody of the law she was in no wise in the *employment* of the United States nor subject to their control. *She did not and could not render them any service while thus held.* The United States had *not stipulated to pay in such a contingency.* * * * The United States are *not blameworthy*, and *not responsible*. (*Goodwin* vs. *United States*, 17 Wall., 517.)

It was only "in consideration of the *faithful performance* of the stipulations of the agreement" that the appellee was to be paid for the use of the vessels, and only so much per day or per hour for each vessel *employed*, and only *when employed* by the day or hour upon the *service under* ~~under~~ *the contract*. He was not to be paid anything for time during which the vessels were *not employed* upon the *designated service* under the contract. The contract does not say that he is to be paid this *per diem* until the vessels are handed over to him, or *restored to him*, or returned to him; but it says he is to be paid this *per diem* for each vessel *employed* when *employed*; that is to say, when *employed* upon the service prescribed in the contract. If the appellee intended to claim compensation for time during which said vessels were being *repaired* or were *not employed* in rendering the service specified in the contract, he should have inserted such a provision in the contract. In the absence of such a provision he is entitled to no compensation during the time his vessels are *not employed* in rendering the *contract service*. If he did not provide for the possibility of accident and for compensation during the time repairs were being made, it is his own fault, and in the absence of such a provision he can not require the United

States to pay for time the vessel has lost and for services which the Government has *never received*.

In *Mitchell* vs. *United States* this same question came before the court. The general owner claimed for eight days delay or demurrage intervening between voyages.

The court say:

> She (the vessel) was chartered at first for a voyage or voyages. The contract was not a *time* charter, notwithstanding the compensation was agreed to be measured by the *time during which* she might be *employed*, and the contract only bound the charterers to *employ* her "on the voyage or voyages aforesaid," and to pay therefor the stipulated *per diem* compensation for every day she was *employed*; that is employed on the voyages. There was no provision for demurrage. * * * The Government undertook to furnish fuel for her navigation until she was *returned* to the owner in New York; but they undertook to pay only for the time she was *employed*. Such was the express agreement. Had it been intended that payment should be made until the vessel was formally *handed over* to the owner or notice given him of such surrender, the words *for each and every day the vessel may be employed* would *not* have been used. The promise would have been to pay for each and every day until the vessel should be *returned to the owner*. * * * It is enough for this case that the charter was for a voyage or voyages; that the engagement of the United States was to employ the vessel on the voyage or voyages, and to pay for each day she *might be employed*. During the eight days for which compensation is now claimed she was *not thus employed*, and consequently *there is no liability resting on the Government*. (*Mitchell* vs. *United States*, 96 U. S., 163, 164.)

Under article 5 of the contract in the case at bar it was the contractor, Daniel Shea, who was liable, and not the Government, if a suitable and proper vessel was not furnished to perform the service *whenever required*, and this suit is an attempt on the part of the contractor to recover from the Government on the very ground upon which his contract would have made him liable to the Government.

In *Wilkinson & Behan* vs. *Dalferes & Johnston*, a boat was chartered for four months at the rate of $800 per month, and it was by the charter party expressly agreed that the boat was tight, staunch, and strong, etc.; that the charterer was to have full control of her, and at the expiration of the charter to return her, etc., in like good order and condition as when first delivered to him the usual damage, wear and tear, consequent upon navigation and acts of God, fire and damage of navigation excepted. Whilst in the second month's service under this charter party *one of the boilers exploded* and the boat sank. The owners sued the charterer and his surety for the *value of the boat*, and the *balance of the second month's rent*.

The charterer averred that nothing was due; that by the explosion and sinking of the boat the contract was terminated; that *there was no negligence or fault on the part of himself or those in charge.* * * * The court say:

> The charterer, when he has complete control of the vessel as in this case, is *pro hoc vice* owner as to parties dealing with him in such capacity, *but he is not such in a contest with the actual owners for the value of the vessel under the terms of the charter party. In such contest* the burden is on the owners to prove the *negligence of the charterer.*

And the court held that the charterer was *not liable* for anything or for either claim. (*Wilkinson & Behan* vs. *Dalfiers & Johnston*, 27 La. Ann., 380.)

The claim in this case is *not* for the *per diem* hire of the steamers *E. H. Webster* and *Joseph Stickney* for the sixty-one days that they were in service under the contract of May 28, 1886. The *per diem* hire of those vessels during the sixty-one days they were in service has been *paid for* in full. The appellee, Daniel Shea, received full payment for the whole service of those vessels (the *E. H. Webster* and the *Joseph Stickney*) which rendered service (Rec., p. 12) and then claimed compensation during the same period for the *James Bowen*, then *undergoing repairs* and *rendering no service* to the Government.

When the appellee had been paid in full for all the vessels that were *employed* by the Government, and for all the *service* which was *rendered* to the Government, he had received every cent that he had a right to under or by virtue of the terms of the contract.

When the appellee asks additional compensation for the time consumed in repairs of the *James Bowen* he asks for *consequential damages* resulting from the collision, and it is respectfully submitted that this suit is in reality nothing but an action for such *consequential damages*.

The remedy of the claimant, if any, can not be given by the Court of Claims or in this action for such *consequential damages*, for whether the remedy be by an action at law or proceeding in admiralty the suit would be clearly one of tort, either an action of trespass on the case or an action for marine *damages*, and the jurisdiction of the

Court of Claims does not extend to such actions of *tort*, but is limited to actions arising upon *contract express or implied*.

But this is not a marine cause. The *James Bowen* was not engaged in the business of commerce and navigation between ports and places in different States; she was merely acting as a *ferryboat*, and collided with another *ferryboat* in a *harbor*.

In the *United States* vs. *Ferryboat Pope* the court, speaking of the act of 1838, say:

> These provisions, I think, show that it was not the intention of Congress to require by the act of 1838 any vessels to be enrolled and licensed, except those which were, before that, required to be *enrolled* and *licensed*. * * * Under the laws enacted previous to that act of 1838, *ferryboats* were *not required to be enrolled and licensed*. * * * The license required to be granted by the act of 1838 is a license to carry on the "coasting trade." Such are the licenses now actually granted, and no other. The coast is the shore. To coast is to navigate along the shore. "The coasting trade" is the trade along the shore. How absurd would it be to require a license to carry on the coasting trade for a vessel that was engaged in *no trade at all*, and certainly in no *coasting* trade. A vessel that merely crosses the river as a *ferryboat* can in no proper sense be said to be engaged in any *trade*; nor can it be said to *coast* or be employed in the *coasting trade*. (*United States* vs. *Steam Ferryboat Pope*, 1 Newberry, 259.)

And in *United States* vs. *The Steamboat James Morrison*, the court say:

> I come, therefore, to this conclusion, that Congress has no authority to require a *license* to carry on a

> ferry over the Missouri River, at a place altogether within the limits of the State of Missouri. (*United States* vs. *The Steamboat James Morrison*, Id., 253.)

The case attempted to be set up in the petition being one for *damages* for a supposed *tort*, the matter was entirely outside of the jurisdiction of the War Department and of the executive officers of the Government.

No question has been more firmly decided by the courts than the proposition that a claim for unliquidated damages is not a subject for settlement in the executive branch of the Government.

In Dunbar's case the court said:

> It needs only a single reading of the bill and the petition to see that the demand is one for *unliquidated damages* for breach of contract. In Power's case and in McClure's case we held that this is a description of claim which *no executive department has or ever had jurisdiction to examine and settle*. (*Dunbar* vs. *United States*, 19 C. Cls. R., 493.)

In another case the same court said:

> The tenth, eleventh, and thirteenth items or counts allege breaches of contract on the part of the defendants, etc., for which they are liable, if at all, *only for unliquidated damages*. We have repeatedly held that the *accounting officers* of the Treasury Department have *no jurisdiction of such claims*. (*Dennis* vs. *United States*, 20 C. Cls. R., 120, 121.)
>
> We have uniformly held that the *departments* have *no cognizance* of claims for unliquidated damages founded on neglect or breach of duty of public officers, even where they grow out of the nonperform-

> ance of written contracts, other than in the payment for work *actually done* or materials *furnished and received*. * * * In addition to that, the present claim is for *damages* on account of an alleged *tort* by public officers, for which the Government is *never responsible*. (*Pitman* vs. *United States*, 20 C. Cls. R., 255.)

In the case at bar all the *work done* and all the *services furnished and received* were by vessels other than the *James Bowen, and the same were paid for;* and the claim which is made is for work *not* done, and for services *not* furnished or received.

The Court of Claims might well have said in the case at bar about the opinion of the Auditor and Second Comptroller what that court said about the opinion of the Quartermaster-General in another case viz:

> General Meigs was unquestionably correct in his opinion, approved by the Secretary of War, that no authority exists in any *executive officer* to allow claims for such *damages*. This court has so held in many cases. (Citing Power's Case, Dunbar's Case, and McClure's Case.) It has long been so understood by *accounting officers* of the Treasury. *Brannen* vs. *United States*, 20 C. Cls. R., 223; *McClure* vs. *United States*, 19 C. Cls. R., 180.)

In a later case before the Court of Claims that court used the following language:

> It is alleged by the several claimants that the *collision* and the loss and *damage* to them were wholly caused by the *fault and negligence* of those in charge of the steamer Pinta, and in no degree by any fault or

negligence on the part of the Tally-Ho. They made application to the Secretary of the Navy for settlement of their claims for damages, which included the loss of the vessel, cargo, ship stores, *and freight*, and the insurance money paid, and the Secretary transmitted the claims to this court. In *Pitman's Case* (20 C. Cls. R., 253), which was identical in principle with the present case, we held, on the authority of *Gibbons* vs. *United States* (8 Wall., 269); *Morgan* vs. *United States* (14, *Id.* 531), and Story on Agency, section 319, that the Government was *not legally liable* in any form for *damages* caused by the *torts of its officers*, and that it was *not within the duties of any executive officer to investigate such claims*. Even the *accounting officers* of the Treasury *can not* pass upon them, as we have repeatedly held. (*Pope* vs. *United States*, 21 C. Cls., R. 52.)

And in a still later case the court of claims held that:

> A claim for *unliquidated damages*, growing out of written, oral, and implied contracts, is not one which the *accounting officers* are authorized to adjust. (*Dennis* vs. *United States*, 23 C. Cls., R. 324.)

In the face of these decisions it must be held that the attempt to settle the *damages* complained of by means of the alleged voucher of the deputy quartermaster-general was *ultra vires*, and that no implied contract arises from that action or upon the alleged voucher. Even if this had not been so an implied contract for $4,087 could not arise upon a voucher for $3,782. It is equally well settled that the Government is *not liable* on an *implied assumpsit* for the *torts* of its officers committed while in the service and apparently for its benefit.

In the case of Gibbons *vs.* United States this court said:

> But it is not to be disguised that this case is an attempt, under the assumption of an *implied contract*, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves *torts*. No Government has ever held itself liable to individuals for the *misfeasance*, *laches*, or *unauthorized* exercise of power by its *officers* and *agents*. The creation by act of Congress of a court in which the United States may be sued presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on *contracts*, *express or implied*. * * * The language of the statute which confers jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government founded on *torts*. The general principle which we have already stated as applicable to all Governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while in the discharge of official duties. * * * In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. *It certainly has not conferred it on the Court of Claims.* (*Gibbons* v*s.* *United States*, 8 Wall., 274, 275, 276.)

And so in a later case this court said:

> The claimants can not recover, on the ground that the injuries to their vessel were occasioned by the tortious act of the quartermaster at Brazos in compelling their master, against his better judgment, to proceed to sea; nor would their condition be improved if the vessel had been actually impressed into the service of

the United States, *for in neither case would the Court of Claims have jurisdiction.* Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the Government. (*Morgan* vs. *United States*, 14 Wall., 534).

In any view of this case the appellee was not entitled to recover anything.

Upon the authorities to which we have referred, it is clear that the appellee could maintain no action on the case which has to sound in *tort* (and would be an action of tort) in the Court of Claims against the United States for loss, injury, or damage sustained by him, or resulting to him from, or in consequence of, an accident to the steamer *James Bowen*, due to the inattention, unskillfulness, lack of precaution, fault, or negligence of the Government's officers or agents. Nor could the appellee maintain any action on the case or action of tort in the Court of Claims against the Government for loss, injury, or damage sustained by him, or resulting to him, from, or in consequence of, an unavoidable accident to said steamer due to *no* inattention, unskillfulness, or lack of precaution, fault or negligence on the part of the Government's officers or agents. And it is equally clear that where the Government has paid the full contract compensation for all the services rendered to it, or received by it, under a contract, it can not be sued in an action *ex contractu* upon said contract for an extra and additional amount not called for or provided for in said contract, no service, or benefit, or equivalent of any kind having been received by the Government therefor.

No matter how this case may be viewed, it is respectfully submitted that the judgment of the Court of Claims is clearly erroneous, and therefore this honorable court should reverse the same.

CONWAY ROBINSON,
Assistant Attorney.
J. E. DODGE,
Assistant Attorney-General.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court OF THE United States.

OCTOBER TERM 1893.

THE UNITED STATES, *Appellant*,
vs.
DANIEL SHEA. } Term No. 396.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellee.

The findings of fact of the court below confine the argument in this case to a very narrow compass.

The agreement between Hodges and Shea was a charter party pure and simple; it is true it did not name any particular vessel, nor any definite time, that is to say, any number of days of service, but that is not required to make it a charter party, which is simply "a contract whereby a vessel is let for hire to another and the charterer is given possession of the vessel."

Clarkson *vs.* Edes, 4 Cowan (N. Y.), 470.
Marcardier *vs.* The Chesapeake Ins. Co., 8 Cranch, 49.
Spring *vs.* Gray, 6 Peters, 151.
Parson Maritime Law, vol. 1, p. 237.

"If the owner retain possession, command, and navigation, and lets merely the capacity or burden of the vessel, it is not a true charter party, but a mere contract of affreightment."

Marcardier *vs.* The Chesapeake Ins. Co., 8 Cranch, 29.
Donahoe *vs.* Kettel, 1 Cliff., 135.
Leary *vs.* The United States. 14 —, 607.
The Erie, 3 Wade, 225.

In the case at bar the vessel was "in the service and under the exclusive management and control of the Quartermaster's Department." *3rd Finding of Fact*, Record, p. 9.

It is settled law that such a charterer is liable for the time consumed in repairs if the vessel is injured while in his control. In the language of Lord Ellenborough: "Whilst the repairs are going on the ship is to be considered in the defendant's (the charterer's) service, and the defendants liable to continue their payments.

Havelock *vs.* Geddes, 10 East., 555.
To the same effect is Ripley *vs.* Scarfe, 5 Barnw. & Cressw., 167.
And see Abb Shipping 43, 248.
Parsons Maritime Law, Vol. 1, p. 259.
Leary *vs.* U. S., 14 Wall., 607.
Flanders on the Law of Shipping Secs, 531-532.

But there is another feature of this case appearing from the records in evidence. The "James Bowen" was in the employment of the Government at so much per day, under a charter, and until discharged by the proper officer (no specified time of service being named in the contract) she must be considered to all intents and purposes as in the Government's employ,

Terry's Case, 9 C. Cls., 233.
Fogg's Case, 5 C. Cls., 264.
Smith's Case, 9 C. Cls., 237.

It is in evidence that while the "Bowen" was being repaired she was still regarded as in the employ of the Government by Col. Hodges, the Quartermaster, who made the contract, and under whose control the vessel was. He says (Rec. 11):

"I personally visited the 'James Bowen' shortly after she was docked, and while the work on her was in progress. She was run into on January 1, 1887, and at once laid up for repairs. The work was pushed forward and completed on the 2d of March, and she *resumed her work* in place of the quartermasters' boat 'Atlantic' on the morning of March 3, 1887. She was

necessarily laid up for the required repairs, therefore, from January 1 to March 2, 1887, inclusive, as I believe from the affidavit of the party who performed the bulk of the work, which is enclosed herewith, and also frequent inquiries made by me while the work was in progress. * * * I was under the opinion, and am still, that the Department was bound to save the contractor from loss on account of the damage, and to pay for her time under the contract *until restored to her owner* upon completion of the repairs."

It is plain, not only from this language but from the acts of the parties, that both the qnartermaster and the owner of the vessel regarded her as in the employ of the Government under the charter during the time she was laid up for repairs. They made the contract and in order to know what the contract means, we must look to their intention in making it and their understanding of it.

Scott *vs.* U. S., 12 Wall., 444.
Ins. Co. *vs.* Gudley, 100 U. S., 616.
Wolsey *vs.* Chapman, 101 U. S., 506.
Oates *vs.* National Bank, 100 U. S., 294.
Jones *vs.* Guaranty Co., 101 U. S., 626.
Read *vs.* Ins. Co., 95 U. S., 30.

When we apply the rule above indicated we find the Quartermaster giving his meaning to the instrument and the services rendered under it, by issuing a voucher for the amount he deems the owner entitled to. This, as we have seen, is *prima facie* evidence of the indebtedness and the Government is bound by it until it is impeached, and no attempt to do so is made here.

We contend, moreover, that the per diem rate for the time of the "James Bowen" should be fixed in the voucher at $67, which is the contract price. The $55 fixed by the Quartermaster was but a reimbursement of Shea for the expense incurred by him in procuring at the Quartermaster's request a vessel to perform for the Department the necessary service while the "Bowen" was laid up for repairs. Shea was under no

obligation to furnish any vessel "in place of the 'Bowen,'" but as it was an inconvenience to the Government, he procured for the Quartermaster a vessel of less size and price. Out of this he made no profit and lost nothing. He stands exactly in the same position as he would had he done nothing to help the Government out of its difficulty caused by the damage to the "Bowen."

The claim was disallowed by the Departmental officials on the ground that at the time of the collision, "the boat was wholly under control of the owner and his agents and employees." The very contrary having been established by the 3rd finding of fact of the Court of Claims, of course the reason for the disallowance fails entirely.

In conclusion we refer the Court to the unanswerable logic of the learned Chief Justice of the Court of Claims in the opinion delivered by him in this case, and printed *in extenso* in the record p. 12.

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